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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 304

AMERICAN AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents*.

BRIEF OF RESPONDENT SLICK CORPORATION IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Whether rulemaking by a regulatory agency becomes invalid when it limits existing authority of a class of those regulated.

STATEMENT

This respondent (an intervenor in the court below) adopts the statement of the case contained in the brief on behalf of the Civil Aeronautics Board in opposition to certiorari.

ARGUMENT

I.

THE DECISION BELOW IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

Petitioners contend, initially, that certiorari should be granted because the Civil Aeronautics Board itself represented to the court below, in seeking rehearing *en banc,* that

> "the question of administrative law presented is of major importance to the administration of the Federal Aviation Act and other similar regulatory statutes . . ." (R. 253)*

The present contention by petitioners is a non-sequitur in view of the ultimate decision below, which supports the rulemaking determination by the Board. A contrary decision *would* have created a problem of "major importance" to the administrative agencies; but the problem did not eventuate by reason of the reversal *en banc.* There is now no problem which would justify the intervention of this court.

A. The Civil Aeronautics Board Was Engaged in Routine Rulemaking

Petitioners' statement of the case (Petition 3-14) contains an excellent analysis of the Federal Aviation Act insofar as herein material—and in some respects immaterial.[1] But petitioners eschew much discussion

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* Record references follow those used by petitioners, see petition page 5, note 3.

[1] We consider the discussion of the tariff provisions to be essentially irrelevant, since if the Board's rulemaking was valid then the tariff consequences thereof are valid as following automatically in the train of the rule; compare *Superior Oil Company* v. *Federal Power Commission,* 322 F. 2d 601, 610 (C.A. 9, 1963), cert. den. 377 U.S. 922 (1964).

of the section which is, we submit, plainly dispositive, namely section 416(a) of the Federal Aviation Act (49 U.S.C. 1386):

> "(a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this subchapter as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this subchapter, to be observed by each such class or group, as the Board finds necessary in the public interest."

Here the Board was acting with reference to its existing differentiation between passenger ("combination") and freight ("all-cargo") carriers.[2] With respect to this classification the Board was prescribing "just and reasonable rules and regulations" of a particular sort. Such prescriptions are necessary from time to time in any area of administrative regulation; and any such action in reference to an already existing classification necessarily may result in some limitation or change in pre-existing authority if it is to be meaningful. This does not make it invalid. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *F.P.C.* v. *Texaco, Inc.*, 377 U.S. 33 (1964). This is, we submit, particularly clear where, as here, the pre-existing authority, i.e., blocked space, has not previously been actually used by the class which claims injury.

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[2] Compare the exercise by the Federal Power Commission of its similar statutory power of classification, in *Superior Oil Company* v. *Federal Power Commission*, *supra*, page 2, n. 1 (322 F. 2d 601, C.A. 9, 1963, cert. den. 377 U.S. 922, 1964).

Petitioners endeavor to distinguish the decisions of the Court just cited by contending that they apply only to "a *threshold* refusal to entertain a license application" (emphasis supplied), petition 21; but even if this were a valid interpretation of this court's decisions—which we think it is not—we submit that a limitation on hitherto unused authority is not significantly different from a limitation on previously unheld authority, in the context of rulemaking.

1. The Nature of Rulemaking

We do not undertake here any extended analysis of the legislative or "rulemaking" function of administrative agencies, as distinguished from their adjudicative function. The majority opinion *en banc,* below, reviews the legal characteristics of this dichotomy (petition 21a-25a). The classic statement in this court is that of Mr. Justice Holmes. In *Prentis* v. *Atlantic Coast Line,* 211 U.S. 210 (1908) he said:

> "* * * A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power * * *." 211 U.S. 226.

In a legislative type of hearing, such as confronted it here, the Civil Aeronautics Board is not seeking to determine rights of a particular carrier vis-a-vis another carrier, but rather is dealing in terms of categories and classifications of carriers, looking toward the future. In such a proceeding "it is not necessary that the full panoply of judicial procedures be used."

Hannah v. *Larche,* 363 U.S. 420, 442 (1960). As has been stated by the court below in a legally somewhat analogous situation:

> "* * * While fact finding may to some extent be involved in the process, the due process requirements of confrontation and cross-examination, the hallmarks of the judicial inquiry, are not necessarily present. Rather the quasi-legislative inquiry tends to consult broad relevant data available from surveys, studies and published experience, free from the limitations of confrontation and cross-examination. Initially, the quasi-legislative inquiry depends on staff work. As here, the staff report often is presented to the interested public with the invitation to appear at a public hearing to oppose or praise. From a practical standpoint, with respect to some forms of quasi-legislative inquiries, * * * * this is the only feasible way to proceed." *Jones, et al.* v. *District of Columbia.* (116 U.S. App. D.C. 301, 304; 323 F. 2d 306, 309 (1963).)

The established distinction between the legislative and judicial types of function of the administrative agencies is grounded in practical as well as logical considerations. This is clearly demonstrated here. The record before the Civil Aeronautics Board indicates on its face the large number of parties involved and the complexity of issues and potential issues which were adumbrated. Whether or not such was the purpose of the demands for hearings of an adjudicative type, the inevitable result of such a proceeding would have been to postpone any effective delineation of carrier roles in this area for many years in the future; and as will appear from an examination of the history of air freight in the Civil Aeronautics Board, see II, below, the passenger ("combination") carriers may well have

expected that the struggling all-cargo carriers could not survive until the termination of a proceeding of such complexity and duration. Such a consideration involves, we submit, a typical exercise of the legislative function.

II.

THE DECISION BELOW IS RIGHT

The dissenting opinion below proceeds on the basic misconception that there has been no legally recognized classification of freight or "all-cargo" carriers, as distinguished from passenger, or "combination" carriers. But such a classification was established by the Board in 1947 and has existed since. In that year, the Board adopted a regulation[3] permitting qualifying carriers to engage in the carriage of property only. Letters of Registration were issued under this regulation to nine carriers, including this respondent. In the *Air Freight Case,* in 1949, the Board decided to regulate this class by way of certificate of public convenience and necessity, and granted such certificates to four carriers, including this respondent. The identity of this class has since been consistently recognized by the Board and by the aviation industry.[4] The dissent is in error in its assumption that "the Civil Aeronautics Board's result here is reached by a rule which has different impacts upon members of the same basic category." (Petition 37a). The all-cargo carriers are not "of the same basic category" as the combination carriers; they are of a different category and have been so since 1947. The fact that their certificates use the same word—

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[3] Section 292.5 of the Board's Economic Regulations, adopted May 5, 1947 (Serial No. 389).

[4] E.g. *Airfreight Certificate Renewal Case,* 23 C.A.B. 186 (1956); *Domestic Cargo Mail Service Case,* 36 C.A.B. 344 (1962).

"property"—in defining their authority, as do the certificates of the combination carriers, seems to have impressed the dissenters, e.g. petition 33a, but is of no significance.

CONCLUSION

Respondent Slick Corporation submits that certiorari should be denied inasmuch as the decision below is 1) in accord with the applicable decisions of this court, and 2) is plainly right.

Respectfully submitted,

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August 29, 1966.

REPLY

BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR PETITIONERS

I. THE RESPONDENTS' APPEAL TO IRRELEVANT LABELS

The briefs in opposition attempt to defend the action of the Civil Aeronautics Board as sustained by the Court of Appeals by affixing labels like "legislative" and "prescriptive" to the Board's action. When action is "legislative" rather than "judicial," so the argument runs, an agency may proceed by rule-making rather than pursuant to more formal notice and hearing procedures.

This is empty argumentation. Where a statute requires notice and hearing before certain action can be taken it is quite immaterial whether the action is characterized as "legislative" or "judicial." Ratemaking, which was the subject of Mr. Justice Holmes' opinion in *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908), quoted in Slick's brief in opposition (p. 4), is a classic example of quasi-legislative action. A ratemaking order looks to the future in the prescription of a new rule for application to future events. Very often, moreover, it deals with classes of parties or even with the universe of those regulated; sweeping minimum or maximum rate orders are typical. See, *e.g.*, *Air Freight Rate Investigation*, 9 C.A.B. 340 (1948). Yet there is no doubt of the necessity, under the usual regulatory statute—including the Federal Aviation Act—that ratemaking be performed on a record developed after notice in an evidentiary hearing.[1]

Licensing, which is what is involved in this case, also looks solely to the future; therefore it also is "legislative" in the sense in which respondents use that

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[1] This has just been recognized unequivocally by the Board's General Counsel—one of the signatories to the Board's brief in opposition—in an important address made on September 8, 1966, to the annual convention of the Federal Bar Association in Washington. The Board has reproduced the address and made it generally available. It is printed as an appendix hereto. (Pp. 1a-7a, *infra*). Recognition of the absolute requirement of notice and evidentiary hearing for ratemaking (unless rates are to be fixed as a condition to the grant of an exemption from the requirements of the Federal Aviation Act) appears at pp. 1a-2a, *infra*.

We refer to this address in other connections in this reply brief. It is a thoughtful and candid discussion, forthrightly informative for the benefit of the year's most important gathering of the legal officers of the federal government agencies and interested members of their bars.

word. Again, however, there is no doubt that under the usual statute the grant or denial—and under the Federal Aviation Act the alteration, amendment, modification or suspension—of a license may be effected only after notice and evidentiary hearing. It has been so held, under another statute that required notice and hearing before a license could be changed, when it was sought to change the certificate authority of an entire class of carriers without following the notice and hearing procedure. *Movers Conf. of America* v. *United States,* 205 F. Supp. 82, 86 (S.D. Cal. 1962). (Three-judge court).

The Flying Tiger Line, sole present beneficiary of the Board's blocked space policy statement and resulting orders, has not filed a brief in opposition in this case. Rather, in another case pending here, it has stated its agreement with the petitioners in the present case that the rulemaking procedure pursuant to which the Board has acted is unlawful. Flying Tiger finds "compelling" the authorities cited by petitioners and accepts the substance of the reasoning set forth by petitioners at pages 14 to 29 of their petition.[2]

II. THE RESPONDENTS' INVOCATION OF AN IRRELEVANT STATUTORY PROVISION

The briefs in opposition scarcely advert to Section 401(g) of the Act, the basis of this Court's decision in *CAB* v. *Delta Air Lines,* 367 U.S. 316 (1961), that an airline certificate of public convenience and necessity cannot be modified without an evidentiary hearing. Instead, they cite the Board's directive from Congress

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[2] See Petition for Certiorari, Flying Tiger Line v. Murphy, No. 508, this Term, pp. 24-26.

to consider certain things as in the public interest, Section 102; its authority to make rules "pursuant to and consistent with the provisions" of the Act, Section 204(a);[3] and its power to establish such classifications of air carriers "as the nature of the services performed by such air carriers shall require," Section 416(a). Neither singly nor in combination do these provisions sanction what the Board has done in this case.

Section 416(a) is particularly emphasized by the respondents. The Board says that "the distinction between combination and all-cargo carriers has been recognized for regulatory purposes ever since the Board certified a group of all-cargo carriers to serve as specialists in this field some twenty years ago." (Br. in Opp. pp. 2-3). And Slick says that "the Board was acting with reference to its existing differentiation between passenger ('combination') and freight ('all-cargo') carriers." (Br. in Opp. p. 3). Common sense tells one that there is a difference between an airline that has a license to carry passengers, property and

[3] The Board cites "49 U.S.C. 1373" for the Board's "broad rule-making powers." (Br. in Opp. p. 7). This is § 403 of the Act, dealing with the filing, publication and observance of tariffs. It gives the Board some rulemaking powers but scarcely broad ones. This section provides for regulations only governing the form and manner of filing, posting and publishing tariffs and the information to be contained in them, § 403(a); it also permits the Board, by regulation or otherwise, to permit the filing of tariff changes on less than the statutory 30-days notice "or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions," § 403(c). Since § 403 was never invoked in the rulemaking proceeding that led to the blocked space policy statement and in any case could have no pertinence, we assume that the citation is an inadvertence and that the intended reference was to § 204(a), 49 U.S.C. § 1324(a).

mail and one that is licensed to carry property and mail or property only. But the fact is that this difference has not been regarded as especially significant in the Board's regulation of carriers. Under the Board's Economic Regulations, 14 C.F.R. Pts. 200-99, distinctions are not drawn between passenger and non-passenger carriers in the regulation of their transportation of property except in a minor respect having to do with the nature and quantity of charter and special service flights that a non-passenger carrier can operate, 14 C.F.R. Pt. 207. And the cargo "specialist," Flying Tiger, is so unimpressed by the Board's classification power that it lately has attacked the Board's passenger charter regulation as illegally discriminatory in limiting the cargo carriers' authority to operate passenger charters in a manner in which the combination carriers' authority is not limited.[4]

In any event, Section 416(a) empowers the Board only to establish classifications of carriers based upon the nature of the services performed by them. This is a power to recognize, for regulatory purposes, differences in the kinds of service for which authority is held by various carriers. It is not in itself a substantive power to prescribe what services particular classes of carriers are authorized to perform, in disregard of the procedures set forth in other provisions of the Act that expressly deal with the way the power to authorize service is to be exercised. Nor is such substantive power supplied by the further authority of the Board conferred by Section 416(a) to prescribe

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[4] Flying Tiger Line v. Boyd, 244 F. Supp. 889, 892 (D.D.C. 1965), *aff'd without opinion sub nom.* Flying Tiger Line v. Murphy, D.C. Cir. No. 19,869, decided June 2, 1966, *petition for cert. filed* August 31, 1966 (No. 508).

"such just and reasonable rules and regulations, pursuant to and consistent with [the economic regulatory provisions of the Act], to be observed by each such class . . ., as the Board finds necessary in the public interest." Regulations under Section 416(a) can only be promulgated "pursuant to" substantive provisions of the Act such as Section 401 and must be "consistent" therewith. The Board, then, is wrong in implying that its action here is sustained by a statutory power to "define distinctions among classes" (Br. in Opp. p. 7), and Slick is wrong in asserting that regulations addressed to classes may validly "result in some limitations or change in preexisting authority" (Br. in Opp. p. 3)—if the procedure prescribed for limiting or changing pre-existing authority has not been followed.

An agency's power to recognize or establish classes of the entities subject to its regulation is relevant when the agency, following the procedure prescribed for it, takes action that affects one group differently from another. That is all that was held concerning the Federal Power Commission's power to classify the persons subject to its jurisdiction in *Superior Oil Co.* v. *FPC*, 322 F.2d 601, 621 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964), cited by Slick (Br. in Opp. p. 3 n.2).

This was apparently the role assigned to Section 416(a) by the court below. It referred to the sections of the Act now cited by the Board, including Section 416(a), and said that "this combination of powers . . . suffices to sustain the regulation on the merits, *assuming no procedural bar.*" (Pet. App. p. 18a) (Emphasis added). Its decision that there was no procedural bar derived from the novel rule it expounded that action that might have to be preceded by adjudicatory process

if directed against a single carrier can be taken by rulemaking if directed to all or an ascertainable class of carriers, a rule for which it claimed no statutory basis in the Federal Aviation Act.

On either rationale, that of the court below or that of the respondents, the question whether decisions of this Court as to the integrity of the licenses of regulated firms [5] may be evaded as the Board has sought to evade them warrants consideration by this Court.

III. THE NATURE OF BLOCKED SPACE SERVICE

The Board says in its brief in opposition that petitioners' "certificates do not authorize—or even mention—blocked-space service, nor did combination carriers attempt to provide it until a blocked-space tariff was proposed by an all-cargo carrier." [6] (Br. in Opp. p. 8). The Board proceeds to say that "combination carriers are authorized to carry freight between the points specified in their certificates" and that "they retain this authority under the [blocked space] rule." (*Ibid.*) The apparent conclusion is that certificate modification procedures were not necessary because the petitioners are still authorized to file such property tariffs as in fact they had filed in the past.

Of course, the certificates of the petitioners do not mention "blocked-space service" any more than do those of the all-cargo carriers. The certificates of both groups of carriers authorize the holders to engage in the air transportation of "property"—without quali-

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[5] CAB v. Delta Air Lines, 367 U.S. 316 (1961); United States v. Seatrain Lines, 329 U.S. 424 (1947); FCC v. National Broadcasting Co. (KOA), 319 U.S. 239 (1943).

[6] Slick makes something of the same point when it refers to "hitherto unused authority." (Br. in Opp. p. 4).

fication. The Board treated this authorization as encompassing blocked space service for both groups of carriers until four days after its policy statement was issued, and for the all-cargo carriers thereafter. (See Pet. pp. 8-11).

Whatever may be said in the Board's brief in opposition, the Board's General Counsel, a signatory to that brief, has forthrightly acknowledged more recently (note 1, *supra*) that "the blocked-space type of rule making . . . permits a diminution in the existing rights of a given class of licenses, without a hearing." (P. 7a, *infra*). And so, indeed, it does. Blocked space is nothing but a low rate for a particular kind of contractual arrangement with a shipper of property. An undiminished "property" certificate authorizes it. It takes a "diminution in the existing rights" of a carrier holding a "property" certificate to withdraw from that carrier the right to file a blocked space tariff. If "diminution in the existing rights" under a carrier's certificate is not "modification" of that certificate, surely merest semantics have triumphed over logic.

In any case, the statements in the Board's brief in opposition portend sweeping significance for the decision below—which the Board's General Counsel's more recent statement does not attempt to disguise. Any combination of reduced passenger fares and some other element—no reservations, closely-spaced seating, etc.—can be decked out as a new kind of "service" just as easily as can blocked space. If the words of the brief in opposition are taken at face value, the Board may now regard itself as empowered, merely by adoption of a policy statement, to authorize carriers *A, B* and *C,* but not carriers *X, Y* and *Z,* to provide

"no-reservation service" or "economy-class service," for example, if only the combination of elements in the tariff terms for the "service" is something different from what has been done theretofore. Such examples are no more extreme than, and no different in principle from, what the Board has done with respect to blocked space. In short, the Board now proclaims that managements' tariff innovations can be controlled by rule-making without evidentiary hearings. This is novel, even revolutionary, in the relationship between government and private management with respect to private initiative in rate competition. *Cf. Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 458-59 (1945); *Arizona Grocery Co.* v. *Atchison T. & S.F. Ry.*, 284 U.S. 370 (1932).

IV. THE ILLUSORY ASSURANCES THAT PETITIONERS WILL NOT BE HURT BY THEIR COMPETITOR'S LOW BLOCKED SPACE RATES

Certainly there would be the same emphasis by the Board in the kind of passenger fare situation we have suggested as there is in this case on the allegedly "experimental" nature of its action, with verbal assurances that the Board would not permit the disfavored carriers to be seriously hurt. The Board plays on this theme in various ways in its brief in opposition.

1. The Board says that petitioners have not yet suffered significant diversion of their freight business. (Br. in Opp. p. 9). If that is so it is because of Slick's demise and Flying Tiger's choice not to engage in all-out promotion of blocked space until this litigation is terminated. The year ending in May 1966 in which the Board says that Flying Tiger's and Slick's share of the air-freight market declined slightly from a previous twelve-month period (Br. in Opp. p. 9 n.7)

included nine months in which Slick's service was suspended. Flying Tiger, which did very well in the most recent twelve-month period for which the Board gives figures, with its traffic growing at a rate quite commensurate with the growth rate of petitioners' freight traffic, has made no secret of the fact that it has been waiting for this litigation to end before it seeks seriously to capitalize on its blocked space monopoly. In its annual report to stockholders for 1965 Flying Tiger noted that its " 'blocked space, program . . . for a long time was under court consideration," during which time "the Company did not stress the development of this program." With the decision of the court below on March 2, 1966, the report went on, "the Company plans to actively pursue this method of shipment." (P. 4).

2. The Board points out that, in denying petitions for reconsideration of its promulgation of the blocked space policy, it stated the obvious—that the policy was subject to change and might someday be changed. (Br. in Opp. p. 6). If this is taken to mean that the certificates of petitioners and the other combination carriers have been temporarily suspended in part rather than altered, modified or amended, the Board's action is still illegal. Suspension as well as alteration, modification or amendment is subject to Section 401(g).

3. If its own assurances are not enough, says the Board, then surely it is sufficient that the court below "noted that the petitioners would have an adequate remedy if the assumptions on which the Board's policy was based changed and the Board refused to take appropriate action to modify it . . . ." (Br. in Opp. p. 7). Despite the invitation extended in our petition to elucidate this point (pp. 28-29), the Board's brief in

opposition leaves as shrouded in mystery as it was when the court made the paraphrased statement the question of how review of a refusal by an agency to amend a rule is obtained—let alone how the dubious availability of such review validates agency action otherwise unlawful.

4. Finally, the Board says that in the investigation of the Flying Tiger and Slick tariffs that is pending before the Board petitioners "will have full opportunity to object that the rate levels of those tariffs prevent them from providing their certificated service." (Br. in Opp. p. 9). This is cold comfort for the petitioners. The Board's view is that only if their ability to transport property between the points named in their certificates is altogether destroyed, their investment of hundreds of millions of dollars in cargo service rendered completely valueless, will they be entitled to relief from their competitor's low rates. That is not the kind of protection of license authority that this Court has had in view in its controlling decisions. (See note 5, *supra*).

V. THE INADEQUACY OF THE BOARD'S RULEMAKING PROCEEDING

The Board suggests, none too forcefully, that the third question raised by petitioners was waived below. (Br. in Opp. pp. 9-10). That is the question whether the Board, in promulgating its policy statement and then in transmuting it into a binding rule of conduct, adhered even to the rudimentary legal requirements as to notice and opportunity to comment in rulemaking. The Board's diffidence is understandable. The issue was before the court below. The point had been argued to the Board. The facts showing lack of notice

and opportunity to comment were stated by the petitioners forcefully and clearly in the court below. The Board devoted upwards of three pages of its brief below to attempting to demonstrate that a contention of "lack of notice and opportunity for comment under the rulemaking requirements of the Administrative Procedure Act . . . lacks merit." (Br. for Respondent, D.C. Cir. Nos. 18,833 et al., pp. 16-20). In their answer to the Board's petition for rehearing en banc petitioners said that "even if the Board had the power it asserts to reduce the Petitioners' certificated authority by rulemaking rather than adjudication, its decision here would have to be reversed because it did not even provide a fair rulemaking proceeding." (Pp. 11-12). The contention was renewed explicitly at the en banc oral argument.

It is clear, moreover, that the question of the fairness of the procedure the Board followed, the adequacy of that procedure in light of the nature and importance of the issues and interests at stake, was inherent in the case from the beginning. The court below engaged in an extended discussion of the adequacy of the Board's procedure in that light. (Pet. App. pp. 26a-30a). Because, we submit, of a faulty appraisal of the Board's rulemaking proceeding, the court concluded that the procedure was adequate. Certainly that conclusion below does not remove the issue from the case here.

What is said in the Board's argument on the merits of this question was anticipated in our petition, except for one thing. The Board states that petitioners filed and the Board entertained petitions for reconsideration after it had promulgated its policy statement and given it effect as a substantive regulation, and after this litigation had begun. It implies that this somehow cured or mitigated the original lack of notice and opportunity to

comment. (Br. in Opp. p. 10 n.8). When the Board published its policy statement and then made it a rule of substantive law, there was of course notice of what was afoot. That, indeed, precipitated this litigation. But Section 4 of the Administrative Procedure Act is designed to assure interested persons the right, through making written comments, to participate in the formulation of rules. It is not enough under Section 4 to afford them the privilege of objecting to rules already made. In *Chicago, B. & Q.R.R.* v. *United States,* 242 F. Supp. 414 (N.D. Ill. 1965), *aff'd per curiam,* 382 U.S. 422 (1966) (Pet. pp. 35-36), where the ICC's repeal of a rule was set aside for lack of notice, those complaining of the lack of notice had filed petitions for reconsideration with the agency; the ICC, whose whole contention was that the complainants had been dealt with fairly, did not even attempt to make this a part of its argument in this Court (or, so far as appears, in the District Court). Rulings on petitions for reconsideration, especially after litigation has begun, are too likely to be briefs in support of the original action to satisfy the Administrative Procedure Act.

One final point: While doubtless unintentionally, the Board's reference to "supplemental notices of January 23, 1964, and June 22, 1964" (Br. in Opp. p. 10 n.8) may be misleading. The "supplemental notice" of January 23 was the first notice in which blocked space was mentioned. It set forth only the Board's proposed policy of encouraging pooling agreements between combination and all-cargo carriers. The June 22 notice was the notice of oral argument, in which the additional question of whether the all-cargo carriers should be allowed to sell blocked space to forwarders and shippers was raised; even then it was not stated that the Board proposed to make this privilege exclusive to the all-cargo carriers. (See Pet. pp. 6-8). The

written comments of petitioners and the other combination carriers were addressed to the first notice. These comments "demonstrated their awareness," to use the Board's words, (1) of the nature of the Board's proposal respecting pooling agreements and (2) of the all-cargo carriers' ultimate goal of securing a monopoly of service in freighter aircraft. But for the latter awareness no thanks were due to the Board or its notice. The all-cargo carriers' White Paper, presented to the Board *ex parte* (Pet. p. 6), had leaked. Moreover, it was not an awareness that the Board itself had under consideration a regulation not even hinted in its notice, whereby it would go all or part of the way toward giving the all-cargo carriers the monopoly they were hoping eventually to achieve. The combination carriers merely said that it would be illegal for the Board to attempt to do what the all-cargo carriers were hoping might someday be done. We invite the Court's reading of the relevant record pages. (R. 193-201, J.A. 129-37).

Much more was required in the way of notice and the opportunity to participate meaningfully in the formulation of its blocked space policy statement than the Board afforded.

CONCLUSION

In its brief in opposition Slick attempts to discount the Board's statement in asking for rehearing en banc below that "the question of administrative law presented [by this case] is of major importance to the administration of the Federal Aviation Act and other similar regulatory statutes . . . ." (P. 2). It says that a contrary decision below would have caused a "problem" of major importance for the administrative agencies but that since the decision was in favor of the Board's power to proceed by rulemaking "the problem did not eventuate . . . ." It is an odd kind of

question that is important or not depending on how it is answered; Slick manages this difficulty only by its switch from "question," which is what the Board said, to "problem," which is Slick's paraphrase.

Regardless of that, however, the General Counsel of the Board, a signatory to the Board's brief in opposition, regards the decision below as "of considerable significance in the light which it throws on the scope of rule-making authority" and as holding "great promise for expanded use of rule making." (Pp. 2a, 3a, *infra*). He made these statements in his address to the Federal Bar Association at its annual convention on September 8, to which we have referred. (Note 1, *supra*). His entire address, as published by the Board, is printed as an appendix to this reply brief at pages 1a-7a, *infra*.

He said that the court below "sustained the Board's action even though the rule had diminished the licenses of the combination carriers without hearing," and he said that one of the "ground rules" that the opinion suggests the court below "will follow in its sympathetic approach to rule making" is that "rule making can be used even where the effect is to take action which would benefit one class of persons at the expense, so to speak, of another." (P. 3a, *infra*). And, although the Board in its brief in opposition here by citation analogizes this case to those cases, notably *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), in which threshold limitations on license applications have been sustained by this Court (Br. in Opp. p. 8 n. 6), the Board's General Counsel in his remarks carefully distinguished between "rule making as a means of carving out categories of license applications that could be denied without an adjudicatory hearing" (*i.e.*, the *Storer* type case) and "the blocked-space type of rule making that permits a diminution in the existing

rights of a given class of licenses, without a hearing." (Pp. 6a-7a, *infra*).

Is the "blocked-space type of rule making," diminishing license rights without a hearing, permissible within the terms of the governing statute and this Court's decisions? That question is novel and of the utmost importance. The petition should be granted.

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